Sathisvaran a/l Chandrasegaran v Agilan a/l Vanmugelan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-04–477 OF 2010

RAUS SHARIF PCA, SULONG MATJERAIE AND AZIAH ALI JJCA

22 MARCH 2012

Tort — Damages — Personal injuries — Claim for medical expenses incurred — Whether appellant liable to pay medical expenses that had been paid by insurer — Whether medical costs were out of pocket expenses — Civil Law Act 1956 s 28A(1)(a)

The respondents filed an action against the appellant in the sessions court for personal injuries sustained in a road accident. The respondents sought to claim, inter alia, the medical expenses they had incurred for the treatment of the injuries they had suffered. The evidence adduced in the course of the trial showed that the medicals costs of RM60,768.74 incurred by the first respondent were paid by his personal insurer, while the second respondent paid for his own medical costs of RM17,806.55. When the sessions court allowed both the respondents' claim for medical expenses, the appellant appealed to the High Court. The appellant claimed that he should not be made to pay the first respondent's medical expenses since these expenses had already been paid by the insurer. The High Court dismissed the appeal and allowed the first respondent's claim for medical expenses, even though the amount had already been paid by the insurer. This was the appellant's appeal against that decision. The appellant argued that in the light of the case of *Frank Astle Ward v Malaysian Airline System Bhd* [1991] 3 MLJ 317 (the *Frank Astle's* case) and s 28A(1)(a) of the Civil Law Act 1956 ('the Act') he should not be liable to compensate the first respondent for the medical expenses incurred by the latter and which were not paid by the first respondent.

Held, allowing the appeal with costs:

(1) The *Frank Astle* case and s 28A(1)(a) of the Act had no application to the facts of the present case. It was clear that in the *Frank Astle* case, the issue of deductibility arose in respect of payment for the loss of earnings which forms part of general damages. Further, s 28A(1) of the Act had clearly stated that such insurance payments were not deductible (see paras 7 & 12).

(2) In the present case, the medical costs of RM60,768.74 incurred by the first respondent were out of pocket expenses and therefore special

damages. In a claim for special damages the test to apply would be whether the first respondent had incurred that expense or had paid an amount, which was a loss to him. The undisputed facts revealed that the medical expenses were paid by the insurer and that they did not come from the pocket of the first respondent. As such, he suffered no loss and was not entitled to such claim (see paras 13–14).

[Bahasa Malaysia summary

Responden-responden memfailkan tindakan terhadap perayu di mahkamah sesyen untuk kecederaan diri yang dialami semasa kemalangan jalan raya. Responden-responden memohon untuk menuntut, antara lain, perbelanjaan perubatan yang ditanggung oleh mereka untuk perubatan bagi kecederaan-kecederaan yang dialami mereka. Keterangan yang dikemukakan semasa perjalanan perbicaraan menunjukkan bahawa kos-kos perubatan sebanyak RM60,768.74 ditanggung oleh responden pertama dibayar oleh syarikat insurans peribadinya, sementara responden kedua membayar kos-kos perubatannya sendiri sebanyak RM17,806.55. Apabila mahkamah sesyen membenarkan tuntutan kedua-dua responden untuk perbelanjaan perubatan, perayu merayu ke Mahkamah Tinggi. Perayu mendakwa dia tidak patut diminta untuk membayar perbelanjaan perubatan responden pertama memandangkan perbelanjaan-perbelajaan ini telah dibayar oleh syarikat insurans. Mahkamah Tinggi menolak rayuan dan membenarkan tuntutan responden pertama untuk perbelanjaan perubatan, walaupun jumlah tersebut telah dibayar oleh syarikat insurans. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa berdasarkan kes *Frank Astle Ward v Malaysian Airline System Bhd* [1991] 3 MLJ 317 (kes *Frank Astle*) dan s 28A(1)(a) Akta Undang-Undang Sivil 1956 ('Akta') dia tidak patut bertanggungjawab untuk memberi pampasan kepada responden pertama untuk perbelanjaan perubatan yang ditanggung oleh responden pertama dan yang mana tidak dibayar oleh responden pertama.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kes *Frank Astle* dan s 28A(1)(a) Akta tidak beraplikasi kepada fakta kes ini. Adalah jelas dalam kes *Frank Astle*, isu potongan berbangkit berkaitan perbelanjaan untuk kehilangan pendapatan yang mana membentuk sebahagian daripada ganti rugi am. Selanjutnya, s 28A(1) Akta jelas menyatakan bahawa bayaran insurans sedemikian tidak boleh ditolak (lihat perenggan 7 & 12).

(2) Dalam kes ini, kos-kos perubatan sebanyak RM60,768.74 ditanggung oleh responden pertama adalah daripada perbelanjaan poket dan oleh itu ganti rugi khas. Dalam tuntutan untuk ganti rugi khas ujian yang diguna adalah sama ada responden pertama telah menanggung perbelanjaan tersebut atau telah membayar sejumlah amaun, yang mana adalah kehilangan kepadanya. Fakta yang tidak dipertikaikan menunjukkan

bahawa perbelanjaan perubatan dibayar oleh syarikat insurans dan ia tidak datang daripada poket responden pertama. Oleh itu, dia tidak mengalami apa-apa kehilangan dan tidak berhak kepada tuntutan sedemikian (lihat perenggan 13–14).]

Notes

For cases on personal injuries, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 282–289.

Cases referred to

Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy [2005] 2 MLJ 679; [2005] 2 CLJ 195, HC (folld)

Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295, FC (refd)

Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban [2006] 3 MLJ 174; [2006] 5 CLJ 265, HC (not folld)

Ward v Malaysia Airlines System Bhd [1991] 3 MLJ 317; [1991] 1 CLJ (Rep) 117, SC (not folld)

Legislation referred to

Civil Law Act 1956 s 28A(1), 28A(1)(a), (1)(c)

Appeal from: Civil Appeal No 12–121 of 2009 (MT3) (High Court, Pulau Pinang)

Sunita Kaur Sandhu (Ajmer Sandhu & Ong) for the appellant.
M Karuppanan (Agusti Ismadi & Karu) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the defendant against the decision of the High Court at Penang dated 28 July 2010 in dismissing the defendant's appeal and upholding the decision of the learned Sessions Court Judge at Georgetown in allowing both the plaintiffs' claim for medical expenses for the treatment of injuries suffered in a road accident.

[2] We heard the appeal on 24 November 2011 and 17 February 2012. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

[3] The facts are not in dispute. The plaintiffs suffered injuries arising out of a road accident. They both sought private medical treatment at Gleneagles Medical Centre. The costs of the medical expenses incurred in respect of the first plaintiff was RM60,768.74 and the second plaintiff was RM17,806.55.

The medical expenses in respect of the first plaintiff was paid by Prudential Assurance Malaysia Bhd ('Prudential Assurance') to Gleneagles Medical Centre while the second plaintiff paid for his own medical expenses.

[4] The only issue argued in this appeal is whether the defendant is liable to reimburse the first plaintiff's medical expenses incurred at the Gleneagles Medical Centre where the same has been paid by the Prudential Assurance.

[5] Learned counsel for the defendant submitted that the defendant should not be liable to compensate the first plaintiff for the medical expenses incurred by him. It was argued that the medical expenses incurred by the first plaintiff was out of pocket expenses and since it was not paid by the first plaintiff, he was not kept out of pocket. Thus, the defendant should not be made to pay for medical expenses that was already paid by Prudential Insurance. In support, he relied on the High Court case of *Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy* [2005] 2 MLJ 679; [2005] 2 CLJ 195 where Faiza Tamby Chik J held as follows:

> *I think special damages means 'out of pocket expenses' which consists of money incurred or paid by the plaintiff, which amounts to a 'loss' to the plaintiff.* During the trial at the sessions court, the plaintiff testified that he incurred a medical bill of RM40,000 and the said bill was paid by ACE General Insurance Bhd his personal insurers. Therefore it is my opinion that the plaintiff's medical bill does not amount to out-of-pocket expenses. It was not paid by the plaintiff and therefore was not a loss to the plaintiff. Hence, the learned sessions court judge has erred in law in awarding the plaintiff for the sum of RM30,000. The learned session's court judge's action has enriched the plaintiff by RM30,000 out of this accident. In the case of *Parry v Cleaver* referred above, Lord Reid held that 'British the Transport Commission v Gourley (1) did two things. With regard to the first question it made clear, if it had not been clear before, that *it is a universal rule that the plaintiff cannot recover more than he has lost*. And, more important it established the principle that in this chapter of the law we must have regard to realities rather than technicalities'. The plaintiff admitted during examination-in-chief that his insurer paid for his medical bill. *He did not pay the bill himself. He incurred no expenses with respect to the medical bill. Therefore, he has no right to be compensated for the said bill … Hence it is clear that the plaintiff cannot claim for the medical expenses paid by the insurance company because the rights to recover the medical expenses lies in the hand of his insurer.* The medical expenses of RM30,000 awarded by the learned sessions court judge has enriched the plaintiff. The enrichment has violated the philosophy behind the principle of compensatory damages upheld by this country. Therefore such an award shall not be allowed.

[6] Learned counsel for the first plaintiff argued otherwise. He submitted that the High Court was right in upholding the decision of the sessions court judge in allowing the first plaintiff's claim for medical expenses, even though the amount had already been paid by Prudential Assurance. He referred to us

the case of *Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban* [2006] 3 MLJ 174; [2006] 5 CLJ 265, where Zakaria Sam J held that the decision of Faiza Tamby Chik J in *Khairul Sham Ahmad* was decided without benefit of the learned judge being referred to the Supreme Court case of *Frank Astle Ward v Malaysia Airlines System Bhd* [1991] 3 MLJ 317; [1991] 1 CLJ 117 (Rep) and s 28A(1)(c) of the Civil Law Act 1956 ('CLA'). A B

[7] Obviously, there are two conflicting decisions of the High Court on this issue. We have read and re-read the two cases and the other authorities submitted to us and we are of the view that the approach taken by Faiza Tamby Chik J in *Khairul Sham bin Ahmad* is the correct approach. With respect, we are unable to agree with the observation by Zakaria Sam J in *Sin Hock Soon Transport Sdn Bhd* that had Faiza Tamby Chik J been referred to the case of *Frank Astle Ward* and s 28A(1) of the CLA, Faiza Tamby Chik J would have come to a different conclusion. We are of the view that *Frank Astle Ward* and s 28A(1)(a) of the CLA has no application to the facts of the present case. C D

[8] In *Frank Astle Ward*, the appellant, an Australian national, was at the material time employed under a contract of service by Malaysia Airlines System ('MAS') as a pilot in East Malaysia Rural Air Services operating in Sabah and Sarawak. It is an agreed fact that on 6 July 1982, the appellant was a pilot of a Norman Islander aircraft flying from Long Somado to Lawas in the Fifth Division of Miri, Sarawak. When the said aircraft developed engine trouble, thus, causing the appellant to make an emergency crash landing on a football field at Long Baya near Lawas. As a result, the appellant suffered head injury and other minor injuries. At the hearing in the High Court, MAS admitted liability at 100% and the only issue was the quantum of damages, both general and special. The learned High Court judge assessed damages for the appellant a sum of RM301,250. However, the learned High Court judge ordered a deduction of RM300,000 which the appellant had received from an insurance company under a general accident policy taken by MAS for the benefits of the appellant and other employees under the terms of their contract of employment, thereby leaving a judgment sum of only RM1,250. E F G

[9] The appellant appealed to the Supreme Court, amongst others, challenging the validity or legality of the deduction of RM300,000 from the accident insurance policy taken by MAS. Mohamed Azmi SCJ, speaking for the Supreme Court at p 126 said: H

> In ordering the deduction, the learned judge relied principally on the House of Lords case of *Hussain v New Taplow Paper Mills Ltd* [1988] 2 WLR 266, and; [1988] 1 All ER 541, and *Nabi v British Leyland (UK) Ltd* [1980] 1 WLR 529; [1980] 1 All ER 667. It would appear that on the question of deductibility, His Lordship applied the simple test of who paid for the premium of the insurance policy. We regret to say that the law in England on deductibility is not that simple. I

In fact, there the law on this subject is so unsettled that Parliament has intervened with a compromise solution by providing in some instances that half of certain payment, over a period can be deducted in assessing the loss, for example, s 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any Court where the statute is silent. The guiding principle governing decision in border line situation is that, *'The common law has treated this matter as one depending on justice, reasonableness and public policy (per Lord Reid in Parry v Cleaver* [1967] 3 WLR 739 (CA); [1970] AC 1 at p 13)'.

[10] Mohamed Azmi SCJ, further pointed out that in Malaysia the issue of deductibility was addressed by Parliament by the introducing s 28A(1)(a) in the CLA which provides:

28A(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:

(a) any sum paid or payable in respect of the personal injury under any contact of assurance or insurance, whether made before or after the coming into force of this Act;.

[11] His Lordship then addressed the issue in the following manner:

To put the issue of deductibility beyond doubt in the present appeal, our Parliament has fortunately for the appellant, introduced s 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere solution against deductibility. We agree with Mr RK Nathan (as he then was) that the plain meaning of the word used in that section should be adopted for the purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death 'under any contract of assurance or insurance' shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

[12] It is clear that in *Frank Astle Ward*, the issue of deductibility, arose in relation to payment in respect for the loss of earnings which forms part of general damages. And s 28A(1) of the CLA has clearly stated that such insurance payments are not deductible. That is not the situation here. In the present case, the claim of the first plaintiff is for the medical expenses incurred while undergoing treatment at Gleneagles Medical Centre.

[13] We are of the view that the sum paid for medical expenses in the sum of RM60,768.74 are out of pocket expenses and are therefore special damages. As

to what are special damages we can do no better than to refer to the words of Mohamed Azmi J (as he then was) in *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 wherein he said:

> Special damage consists of out-of-pocket expenses, such as hospital bills and actual losses of earning during period of total incapacity, and is generally capable of substantially exact calculation.

[14] In *Khairul Sham bin Ahmad*, Faiza Tamby Chik J referred to *Sam Wun Hoong v Kader Ibramshah* and said:

> I think special damage means 'out-of-pocket expenses' which consists of money incurred or paid by the plaintiff, which amount to a 'loss' to the plaintiff.

Therefore the test to apply in a claim for special damages would be whether the first plaintiff has incurred that expenses or has paid an amount, which is a loss to him. The undisputed facts revealed that medical expenses of RM60,768.74 was paid by the Prudential Assurance. Since the first plaintiff did not pay the medical expenses, he incurred no expenses with respect to the medical expenses. In other words, the medical expenses did not come from the pocket of the first plaintiff. He suffered no loss and therefore, he is not entitled to such claim. To allow such claim, would in our view tantamount to facilitating the first plaintiff's enrichment and it would be contrary to the universal rule that he is allowed to recover something which he has not lost.

[15] For the above reasons, we allow the appeal with costs. The order of the High Court in affirming the order of the sessions court ordering the defendant to pay the first plaintiff RM60,768.74 is hereby set aside.

Appeal allowed with costs.

Reported by Kohila Nesan